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November 24, 1999  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., SW, Room TWB-204  
Washington, DC 20554

Re: Notice of Ex Parte Contact  
In the Matter of the Application by New York Telephone Company (d/b/a Bell Atlantic - New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York, CC Docket No. 99-295

Dear Ms. Salas:

Yesterday, AT&T filed the attached letter with your office. The seven-page letter should be applied to the 20-page ex parte page limit imposed by the Commission's revised Section 271 application procedures released by the Bureau on September 28, 1999.

Two copies of this Notice are being submitted in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

Robert W. Quinn, Jr.

Attachment

cc: C. Wright, General Counsel, Federal Communications Commission  
D. Attwood, Legal Advisor to Chairman Kennard  
J. Goldstein, Legal Advisor to Commissioner Ness  
R. Beynon, Legal Advisor to Commissioner Furchgott-Roth  
K. Dixon, Legal Advisor to Commissioner Powell  
S. Whitesell, Legal Advisor to Commissioner Tristani  
L. Strickling, Chief common Carrier Bureau  
R. Atkinson, Deputy Chief, Common Carrier Bureau  
B. Bailey, Counsel, Common Carrier Bureau  
C. Mathey, Chief, Policy and Program Planning Division  
M. Carey, Deputy Chief, Policy and Program Planning Division  
A. Kearney, Attorney, Policy and Program Planning Division

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Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: Application By Bell Atlantic-New York For Authorization To Provide  
In-Region, InterLATA Services In New York, CC Docket No. 99-295

Dear Ms. Salas:

AT&T Corp. ("AT&T") submits this ex parte letter to respond to claims that were raised for the first time in the reply comments of Bell Atlantic-New York ("Bell Atlantic") and the New York Public Service Commission ("PSC").<sup>1</sup> In their replies, Bell Atlantic and the PSC contend that the Commission can deem the Act's pricing requirements to be satisfied even though they concede that there is no supporting evidence in the record and even though they do not refute any of AT&T's factual showings. For the reasons explained more fully below, these contentions are baseless.

In section 271 of the Act, Congress determined that a BOC's entry into long distance markets would harm competition unless other carriers then had the unqualified ability to obtain the components of the BOC's network at their economic cost and to use these unbundled network elements to offer competing local and long distance services. In particular, Congress prohibited any BOC from providing in-region interLATA services unless and until it demonstrated, and the Commission found, that the BOC, among other things, is currently charging rates for unbundled network elements that are "in accordance with the requirements of sections 251(c)(3) and 251(d)(1)." 47 U.S.C. § 271(c)(2)(B)(ii). Under these requirements, a BOC's network element rates must be "based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration." 47 C.F.R. § 51.505(c). The Commission has found that these are the costs the BOCs incur in using the elements and that if higher rates were charged, it would subject new entrants to anticompetitive "price squeezes" and would preclude effective competition and efficient entry alike. Local Competition Order, 11 FCC Rcd. 15499, ¶¶ 674-703 (1996). As the Commission has also held, "efficient competitive entry into the local market is vitaly dependent upon appropriate pricing of the checklist items." Ameritech Michigan Order, 12 FCC Rcd. 20543, ¶ 281 (1997) (emphasis added).

Nevertheless, in its application, Bell Atlantic provided no basis for the Commission to determine whether Bell Atlantic's current network element rates satisfy the Act's pricing

<sup>1</sup> BA Reply at 51-55 & Lacouture/Troy Reply Dec. ¶¶ 180-93 (App. A, Vol. I, Tab 1 to BA Reply Comments); PSC Reply at 42-48.

requirements. AT&T's opposition demonstrated in detail that the loop and switching rates patently fail to meet these standards and are excessive. The loop rate was set on the basis of an assumption that is demonstrably false and that has elsewhere been rejected by the Commission as well as by virtually every other state commission: that, regardless of the length of the loop, it is more efficient to use fiber, rather than copper, in the loop feeder plant. See Clarke/Petzinger Aff. ¶¶ 19-43 (Vol. D to AT&T's Comment). Similarly, the switching element rates are based not on the forward-looking cost of efficiently replacing the switches in Bell Atlantic's existing wire centers, but on the much higher per line costs of incrementally adding capacity to the existing embedded switches. Id. ¶¶ 44-69.

In their replies, Bell Atlantic and the PSC advance two basic claims. First, they argue that the Commission cannot review a BOC's rates for compliance with the Act in a section 271 proceedings. Second, they claim that, despite their failure to refute AT&T's factual showings, the Commission can find that the rates satisfy the checklist by speculating about the significance of other "facts" that have no record support or, in the case of the switching rates, by relying on their "interim" character. Each claim is spurious.

The Procedural/Jurisdictional Arguments. Bell Atlantic and the PSC claim that the Commission cannot here review Bell Atlantic's loop and switching element rates to determine if they comply with the requirements of the Act. However these contentions were previously advanced by the BOCs and the states, and were squarely rejected by the Commission and the Supreme Court on the ground that they are foreclosed by the plain terms of the Act.

Section 271(d)(3)(A) of the Act expressly provides "[t]he Commission shall not approve [a section 271 application] unless it finds that the petitioning Bell operating company has . . . fully implemented the competitive checklist in subsection (c)(2)(B)" (emphasis added). By contrast, rather than mandate the Commission to defer to a prior state rate order, the Act makes it explicit that the Commission is not required to give state commission determinations even the "substantial weight" that those of the Department of Justice must receive. Indeed, the Commission is obligated to do no more than "consult" with pertinent state commissions before the Commission independently decides whether each checklist item is "fully implemented." Compare 47 U.S.C. § 271(d)(2)(A) with id. § 271(d)(2)(B). Because this unconditional duty has been imposed on the Commission – which is not a party to state rate proceedings – and because section 271 protects the rights of the public to full and fair long distance competition, the assertion that the Commission could be collaterally estopped from reviewing a rate that a state has previously approved is nonsensical.

The Commission and the Supreme Court have thus squarely rejected the claims that the Commission can or must defer to a state commission's determination that particular rates satisfy the Act's requirements and this item of the competitive checklist. As the Commission stated in the Ameritech Michigan Order, "[t]he Act vests in the Commission the exclusive responsibility for determining whether a BOC has in fact complied with the competitive checklist," and the Commission "must assess whether a BOC has priced interconnection, unbundled network elements, transport and termination and resale in accordance with the pricing requirements set forth in Section 252(d)." See Ameritech Michigan Order, 12 FCC Rcd. 20543, ¶ 282 (emphasis added). Accordingly, the Commission has squarely held that it must "determine whether the BOC's prices for checklist items in fact meet the relevant statutory requirements." Id. ¶ 288 (emphasis added). Indeed, the Commission has underscored the point by holding that "it is not the label that is critical in making our assessment of checklist compliance, but rather what is

important is that the prices reflect TELRIC principles and result in fact in reasonable, procompetitive prices.” Id. ¶ 290.

Further, the Supreme Court has agreed that the Commission must independently determine that a BOC’s rates satisfy the Act’s pricing requirements before the Commission may grant a section 271 application. In particular, after the Commission adopted the Ameritech Michigan Order, the BOCs and state commissions asked the Eighth Circuit to issue a writ of mandamus prohibiting the Commission from denying a section 271 application on the ground that the state commission had not applied the TELRIC standard or had done so incorrectly. The Eighth Circuit issued the writ. Iowa Utils Bd. v. FCC, 135 F.3d 535, 543 (8<sup>th</sup> Cir. 1998). However, the Supreme Court reversed this order after holding, in AT&T Corp. v. Iowa Utilities Board, 119 S. Ct. 721 (1999), that the Commission has jurisdiction over all the pricing requirement of sections 251 and 252 of the Act and the explicit duty under section 271 to assure that the relevant state and BOC has properly implemented them before that BOC can receive long distance authority. FCC v. Iowa Utils. Bd., 119 S. Ct. 1022 (Mem.) (1999).

For the same reason, there is no basis to the PSC’s contention that the Commission cannot review Bell Atlantic’s loop and switch rates because AT&T did not file appeals challenging the PSC’s rate orders under section 252(e)(6) of the Act. PSC Reply at 43-44.<sup>2</sup> The terms of section 271 categorically require the Commission independently to determine whether the BOC’s current prices satisfy the Act’s requirements – regardless of whether state arbitration proceedings have been concluded or appealed. Further, there is nothing in the Act that remotely suggests that an appeal under section 252(e)(6) is the only proceeding in which AT&T or any other person can claim that a BOC’s rates are excessive.

To the contrary, sections 251, 252 and 271 require that rate determinations be made under the Act by different entities under different procedures and for different purposes. Those differences demand that before the Commission grants any section 271 application, it must determine that the current rates in effect (whether interim or final) satisfy the requirements of the Act, regardless of whether the Commission would thereby be disagreeing with the determinations made by a state commission or a reviewing court in the prior proceedings under sections 251 and 252. The reason is that sections 251 and 252 establish procedures that are designed rapidly to establish interconnection agreements that would allow the creation, for the first time, of competitive alternatives to local telephone services that have heretofore been monopolies.

By contrast, section 271 proceedings have a very different purpose and very different competitive consequences if a BOC’s rates for network elements are excessive. Congress found – as the experience with the Qwest-U S WEST/Ameritech marketing arrangements vividly demonstrated<sup>3</sup> – that it will immediately distort and impede the existing competition in the long distance market if a BOC is able to offer one stop shopping for local and long distance before long distance carriers have the ability to do so ubiquitously by leasing local facilities at unit costs no greater than the BOC incurs, or otherwise. Similarly, it would immediately threaten the

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<sup>2</sup> Ironically, the PSC is contending in the very proceeding to which it would have the Commission defer that the Eleventh Amendment precludes federal district courts from reviewing prices established by orders of state utility commissions. See, e.g., Mem. of Law of PSC of New York in Support of its Motion for Summary Judgment, Civ. Action No. 97-CV-1600, 43-49 (filed N.D.N.Y. June 30, 1998). Further, Bell Atlantic and the PSC both are claiming in federal court that the switching rates are not reviewable because they are not “final.”

<sup>3</sup> Qwest Order, 13 FCC Rcd. 21438 (1998), aff’d, 177 F.3d 1057 (D.C. Cir. 1999).

vibrant existing long distance competition if the Commission granted a section 271 application because it deferred to erroneous rate determinations made in the prior section 252 proceedings.

The Replies' "Defense" Of The Current Rates. The replies of Bell Atlantic and the PSC do not dispute any of the economic principles and mathematical facts set forth in AT&T's opposition about the relative costs of fiber and copper or about the true costs of switches. Instead, Bell Atlantic and the PSC contend that despite the undisputed facts of record, the Commission can find that this critical checklist item is satisfied on the basis of rank speculation that is unsupported by any evidence, that is facially implausible, and that is contradicted by Bell Atlantic's own prior positions.

Loop Rates. First, Bell Atlantic and the PSC claim that it is irrelevant that nearly every other state commission – and this Commission in its universal service proceeding<sup>4</sup> – have determined it is inefficient, and improper, to base loop prices on the assumption that all feeder plant is comprised exclusively of fiber. Nor do they attempt to show that, as a matter of mathematics, fiber feeder costs more than copper for runs of less than some number of feet, be it 9000, 12000, 18000, or some other number. Their claim rather is that there are “unique circumstances” in New York City, especially Manhattan, that may alter this calculation of the “cross-over” point and that this speculation is sufficient to establish compliance with this checklist item. PSC Reply at 46; Lacouture/Troy Reply Dec. ¶¶ 183-86.

Even if this claim could be supported – as it has not been – Bell Atlantic and the PSC have failed to make the showing required by the Act. The all fiber-based loop rates at issue apply to the entire state of New York, not just to New York City or Manhattan. By seeking to justify the assumption of an all fiber feeder only in some or all of New York City, Bell Atlantic and the PSC have effectively conceded that the rates set by the PSC are inappropriate for the rest of the state of New York.

Beyond that, the Bell Atlantic and PSC claims applicable to New York City are facially insufficient to justify these loop rates, and have been rejected by virtually all other states and the Commission alike. Specifically, Bell Atlantic and the PSC rely only on the fact that fiber has (or may have) lower provisioning, maintenance and structure costs than copper – per foot or per some other unit of capacity. But absent quantification of these alleged advantages, that is patently not enough to justify all fiber feeder plants, for it is undisputed that fiber cable requires expensive DLC equipment at the Feeder-Distribution Interface. See BA Reply at 53; PSC Reply at 44-45. This means that a fiber facility incurs large fixed costs regardless of the length of the feeder run. By contrast, there are no such fixed costs for copper cable. Bell Atlantic and the PSC have not attempted to show that the existence of lower unit costs for maintenance, provisioning and structure is not more than offset by the fixed DLC equipment costs on shorter runs. Nor do they dispute the conclusions of the Commission, virtually all other state commissions, and even other BOCs that copper is the lower cost solution for shorter runs,

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<sup>4</sup> Clarke/Petzinger Aff. ¶¶ 26-37 (citing and discussing decisions). Contrary to Bell Atlantic's claim, the universal support mechanisms proceeding decisions on network engineering and network investment issues are highly relevant because the Commission calculated universal support mechanisms using the same forward-looking, economic cost methodology applicable here, and announced that it would determine the “least-cost method of placing loop facilities.” Inputs FNPR, 12 FCC Rcd. 18514, ¶ 84 (1997). Its determination that copper feeder may be used for loops up to 18,000 feet makes clear that fiber feeder is not the “least cost, most efficient” method. Indeed, in the Commission's runs of the Synthesis Model copper is the least cost feeder technology for over half the loops.

including those in large, densely populated metropolitan areas. See generally Clarke/Petzinger Aff. ¶¶ 22-37.

In this regard, the PSC order adopting Bell Atlantic's position contended only that fiber is the lowest cost technology, without suggesting that there is anything unique about New York City or Manhattan. PSC UNE Pricing Order, Case 95-C-0657, et al., at 83 (PSC Apr. 1, 1997). Now, in their replies, Bell Atlantic and the PSC argue that the population per square mile in New York City is uniquely high and assert without any support that "there is ample reason to believe" that the greater capacity of fiber will give it cost advantages over copper "even where distances are short." PSC Reply at 45-46; Lacouture/Troy Reply Dec. ¶¶ 183-86. But the claim that the population density of New York City is unique is based on apples and oranges comparisons (i.e., comparing Manhattan to the County of San Francisco, PSC Reply at 45 n.4)), and there are downtown areas of Chicago, San Francisco, and many other major cities that have densities comparable to Manhattan's and where state commissions have recognized that copper is the lower cost technology for shorter distances.

Significantly, the PSC has elsewhere acknowledged that there is no evidence in any record that supports Bell Atlantic's all fiber feeder assumption. In the 1997 Rehearing Order<sup>5</sup> that upheld these loop prices, the PSC admitted that the evidence before it "did not itself set forth specific quantitative information on the relative economics of the two transmission media." Instead, the PSC approved these rates based solely on evidence that was not introduced into the record: a purported 1991 "study" of Bell Atlantic's plan to modernize its network. PSC UNE Pricing Order at 83; Rehearing Order at 26-27. Bell Atlantic claimed that this 1991 study is proprietary, and it was thus not introduced into the record in the PSC's pricing dockets (Rehearing Order at 20) or in this section 271 proceeding. Thus, the Commission and the parties to this proceeding are in no position to determine if the study could support these inflated loop rates.

Beyond that, a subsequent staff report on the 1991 study strongly criticized Bell Atlantic's cost estimates and expressly declined to find that fiber was the least cost feeder technology. Rather, the report observed that it was "difficult to accept the company's estimates as valid indicators of the costs of the various fiber deployment alternatives" and that "[s]ome copper is still being used when the economics specifically warrant it (such as for jobs involving short distances)." Staff Report Assessing Modernization Needs and New York Telephone's Plans, at VII-14, VII-10 (Nov. 12, 1992). Thus, the PSC's staff concluded "[t]he cost effectiveness and the public need for accelerated deployment of fiber in the loop have not been established." Id. at VII-16.

In stark contrast, in its opposition in this proceeding AT&T provided a quantitative analysis of the relative costs and benefits of fiber versus cable. Even under the most conservative assumptions, including using Bell Atlantic's preferred inputs reflecting the alleged "uniqueness" of New York City, that analysis demonstrated that copper was more efficient than fiber for loop lengths less than 9,000 feet. Clarke/Petzinger Aff. ¶¶ 22-25 & Att. 3. Thus, the only "specific quantitative information on the relative economics of the two transmission media" in the record in this proceeding unambiguously demonstrates that the assumption of all fiber feeder, even in New York City, greatly overstates Bell Atlantic's loop rates.

Switching Element Rates. Bell Atlantic's and the PSC's replies make similarly groundless attempts to defend Bell Atlantic's switching rates. They do so by relying on the

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<sup>5</sup> Opinion No. 97-14, Case 95-C00657, et al., at 23 (PSC Sep. 22, 1997).

irrelevant fact that the PSC rejected the even higher rates proposed by Bell Atlantic, by advancing speculative and counterintuitive claims that other “adjustments” to rates might have offset the reductions required by the discounts Bell Atlantic would receive on new switches, and by contending that an embedded cost rate methodology is acceptable for purposes of Section 271 if the rates are merely “interim.”

First, it is irrelevant that the rates were based on a study prepared by the PSC’s staff and that the PSC rejected the rates and cost studies proposed by Bell Atlantic. The PSC does not dispute that it did not apply the TELRIC methodology required by the Commission’s pricing rules. Those rules require that rates be based on the “long run” costs of a “reconstructed local network” (Local Competition Order ¶ 685) using the “lowest cost network configuration” (47 C.F.R. § 51.505(c)). In the long-run, a carrier’s “present plant and equipment will have been worn out or rendered obsolete and will therefore need replacement.” Local Competition Order ¶ 677 n.1682. Thus, as the Commission has held, the long run costs of providing switching is based on the cost of replacing all the BOCs’ switches using the most efficient technology. Inputs Order, CC Dockets 96-45, 97-160, ¶¶ 315, 317 (FCC Nov. 2, 1999).

The PSC, however, did not seek to determine the “lowest cost network configuration,” but instead measured Bell Atlantic’s “actual cost[s]” for “33 switch installations during 1993 and 1994.” PSC UNE Pricing Order at 85. These “actual costs” did not reflect the costs of new switches in that time period. Rather, the installations that were the subject of the staff’s analysis reflected only the higher costs associated with increases to the capacity of existing switches. *Id.* Neither the PSC’s staff nor the PSC itself made an adjustment to reduce the per-line switch price to reflect the steep discounts that Bell Atlantic realizes when it contracts to purchase new switches.<sup>6</sup> Thus, rather than set switch prices on the basis of the prices a carrier would in fact pay to buy new switches that are optimally sized to serve demand, as the Act requires, the PSC improperly set rates that reflected the much higher cost of capacity that is bought piecemeal as upgrades to an embedded network.

The PSC acknowledges that the rates did not apply the TELRIC method and were set at artificially high levels because Bell Atlantic had withheld from the PSC the evidence of the extensive discounts Bell Atlantic actually receives on new switch purchases. PSC Reply at 47. See also Re-Open Order, Case 95-C00657, *et al.*, at 8-11 (PSC Sep. 30, 1998). The PSC also admits that after AT&T’s efforts brought this evidence to light, the PSC refused to reduce the rates to reflect these discounts despite the fact that Bell Atlantic’s own cost expert testified that had he been aware of the true discount levels, he “would certainly change [the] numbers” in the switching cost study. Re-Open Order at 9. Instead, it concluded it would only consider the evidence in a future pricing proceeding. PSC Reply at 47.

Second, Bell Atlantic and the PSC are thus reduced to speculating – without any support – that the failure to use the actual efficient replacement cost of Bell Atlantic’s switches may not have unreasonably inflated the switching element rate. They speculate that if the PSC used the actual forward-looking switch costs and discounts, it could have had “ripple effects of the discount adjustment . . . that might raise [other] switching costs.” For example, the PSC reply states that these could include unexplained adjustments to Bell Atlantic’s “installation factor adjustment.” PSC Reply at 47 & n.3; Lacouture/Troy Reply Dec. ¶¶ 192. Tellingly, the PSC

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<sup>6</sup> Its only adjustment to Bell Atlantic’s actual and inflated costs was a token reduction of 5% to reflect the general trend of declining switch prices. *Id.* But this is not even a correct measure of the actual decline in prices for the cost of switch upgrades. Clarke/Petzinger Aff. ¶ 58 & n.18.

and Bell Atlantic offer no evidence of whether these "ripple effects" would in fact occur and whether or how they could offset the obvious and significant impact of using the proper switch discounts. Instead, they engage in carefully guarded speculation of things that "might" occur. This failure of proof is particularly telling in that AT&T's opposition explained that there is no conceivable "installation factor" adjustment that could remotely offset the rate reductions that would result from use of the proper switch costs. *Clarke/Petzinger Aff.* ¶ 66 n.24.<sup>7</sup>

Similarly meritless is the claim that there could be still unnamed other "adjustments" that could have some unquantified offsetting effect. PSC Reply at 47; see also Lacouture/Troy Reply Dec. ¶ 192. There is no evidence of what these adjustments could be, and this speculation, too, affords no grounds for a finding that this checklist item is met. This record shows that a proper application of the TELRIC methodology would likely produce switching rates that are radically lower than those currently in effect – possibly by orders of magnitude. For example, it is undisputed that switching rate set by the PSC reflected a per line cost of \$286.51. PSC UNE Pricing Order at 85. This is almost triple the forward-looking value adopted just this month by the Commission in the universal service proceeding.<sup>8</sup>

Finally, Bell Atlantic and the PSC contend that the error in the setting of switching element rates is harmless because the rates are "interim" in the sense that the PSC announced it will conduct a new pricing proceeding in the future and that, if it orders a reduction in Bell Atlantic's switching rates, Bell Atlantic will have to pay refunds to carriers that paid the excessive rates.

But that fact does not bring the rates into compliance with the requirements of the Act. Section 271 allows the grant of an application only if the rates then in effect (be they "interim" or "final") satisfy the Act's pricing requirement. Otherwise, the new entrant will immediately incur inflated charges that prevent it from effectively competing with the BOC; it will not know with certainty what the final rates will be, and it will not receive the lower rates to which it is entitled even after the fact unless it incurs the costs of litigating the question of the proper rate levels in the future PSC proceedings. The net effect is that, irrespective of any future refund, the requesting carrier will have incurred higher economic costs than the BOC in the period after an application is granted. That is why section 271 requires a BOC to prove, and the Commission to find, that a BOC is currently in compliance with the checklist and why paper promises to conform a BOC's conduct to the Act's requirements in the future can never suffice.

Very truly yours,

*Mark C. Rosenblum*  
*/s/*

<sup>7</sup> In fact, the PSC itself has observed that the 37% installation factor "appear[s] to be out of line with those of other companies." Re-Open Order at 10. For example, it is over four times greater than the 8% installation factor adopted in the Universal Service proceeding.

<sup>8</sup> Investment Input Worksheet of the FCC USF Synthesis Model run for Bell Atlantic-New York. Dividing total end office switch investment (\$1,145,595,905) (column AN) by total switched lines (10,808,322) (column B total lines minus column E special access lines) results in an investment of \$105.70 per line. This per line figure includes all switch related investments.